



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 4
ATLANTA FEDERAL CENTER
61 FORSYTH STREET
ATLANTA, GEORGIA 30303-8960

March 10, 2010

Colonel Byron G. Jorns
District Engineer
U.S Army Corps of Engineers, Mobile
Regulatory Division, Inland Branch
Attn: Linda Brown (RD)
P.O. Box 2288
Mobile, Alabama 36628-0001

Subject: Gulf Intracoastal Waterway Final EIS Projects
Foley Land Cut Development (multiple applicants), JPN of January 14, 2010

Dear Colonel Jorns:

The U.S. Environmental Protection Agency (EPA), Region 4, has reviewed the Joint Public Notice (JPN) dated January 14, 2010, and Final Environmental Impact Statement (FEIS) dated December 2009, for construction of 15 mixed-used developments that include 17 marinas along the Foley Land Cut (FLC) of the Gulf Intracoastal Waterway. The proposed projects include over 16,700 condominium units, over 3,000 boat slips, various commercial establishments, support facilities, and resort amenities. The applicants are seeking authorization for dredge and fill activities that involve 3,143,195 cubic yards of dredging, 6,665 cubic yards of riprap placement, and direct impacts to wetlands totaling 2.05 jurisdictional acres (as well as 4.12 non-jurisdictional acres of wetlands). EPA appreciates the reductions in impacts to aquatic resources that have already been made during the development of the EIS, but does have some remaining concerns regarding the actual demand for development of the proposed extent, basin configuration for flushing to protect water quality, cumulative impacts associated with the Oyster Bay development (SAM-2006-310-MBM), and lack of compensatory mitigation for the Walker Creek development (SAM-2005-466-MBM). Those concerns were detailed in our letter of February 10, 2010, and are incorporated here by reference. The following comments describe EPA's concerns with the proposed impacts in regards to the Clean Water Act (CWA) 404(b)(1) Guidelines (Guidelines), implemented through 40 CFR Part 230, and the 2008 Mitigation Rule (40 CFR Part 230 Subpart J).

Purpose and Need

The proposed development projects are described as "needed to meet market demand of residential property owners along the FLC for wet and dry storage of watercraft and for convenient and safe waterway access for recreations [*sic*] pursuits, such as boating and fishing."

However, documentation of market demand is limited, and does not adequately support the need for a project of this scope.

Alternatives Analysis

Particularly given that the need for development to this extent may not exist in the current economic conditions, the minimum boat slip alternative is preferable to the maximum alternative. However, the minimum boat slip alternative would eventually reach the same level of development if the additional boat slips are fully phased in after the five evaluation periods, and environmental effects are not included among the key monitoring report elements indicated as the basis for deciding whether to phase in the additional boat slips. We recommend including environmental considerations such as water quality monitoring in the marina basins (e.g., dissolved oxygen, nutrients, sediments/turbidity), evaluation of shoreline erosion possibly associated with increased boating activity, and indicators of ecological/habitat condition (e.g., for wetlands incorporated into site design or in the vicinity of developed sites) and establishing protective criteria that must be met before additional slips are permitted.

Water Quality

One of the concerns previously expressed is that if dredging of marinas is to an equal or greater depth than the FLC, then there may not be a sufficient head difference to ensure flushing of the basins. Low dissolved oxygen could ensue, posing water quality problems. In the FEIS, the dredging depths have been revised to -12 feet mean low water (MLW) (for nearly all projects – confirmation of target depth is still needed for Bayside Harbour), which is an improvement over the original designs, some of which were much deeper. However, the target depth for the FLC is -12 MLW, with overdredge to -14 MLW, so it is unclear how a sloping gradient towards the FLC will be achieved. Is any over dredge planned in creating and maintaining the marinas? Any deviations beyond the target for the marinas could exacerbate lack of head difference, hinder flushing, and lead to violations of the water quality standard for dissolved oxygen, so target dredge depths may still need to be reconsidered in light of the Intracoastal Waterway depth. At least one other channel associated with similar boating facilities along the FLC has a depth of less than 10 feet below MLW; is there a demonstrated need for greater channel depths at any of the proposed marinas?

Oyster Bay and Bon Secour Bay are both on Alabama's 303(d) list with impairment for pathogens. The potential activity from the hundreds of additional boat slips proposed (given that realistically, compliance with the Alabama Clean Boating Act will not be 100 percent) introduces the likelihood of contributing to this impairment, particularly in Oyster Bay. Moreover, given that similar marina-building in Oyster Bay might well follow should this project be approved, the cumulative effects have even greater likelihood of exacerbating the impairment. The FEIS states that existing sanitary services for boaters traveling through the FLC are limited, and assumes that the marinas will comply with the Alabama Clean Boating Act by installing appropriate facilities. Ensuring that these are incorporated into the marina design plans is recommended to facilitate compliance. Additional support for protecting water quality from effects of the boating activity that would be brought to the FLC by these projects may be

available from resources such as National Oceanic and Atmospheric Administration's Clean Marina Initiative.

For the Oyster Bay proposal, at ~2/3 mile long and 10 feet wide, this is an extensive boardwalk beyond the typical pedestrian access way, and would facilitate considerable boating activity in Oyster Bay. The impacts of construction (including excavation of 675,000 cubic yards of material), boating activity associated with 396 slips, maintenance dredging (marina and channel of 4,600 feet), and similar activities that may follow as cumulative impacts are considerable. The potential water quality degradation from these activities is concerning, particularly in a sheltered bay fringed by wetlands that likely provides valuable habitat. A letter of January 26, 2010, from the U.S. Fish and Wildlife Service supports this idea and indicates that the habitat in Oyster Bay may not have been appropriately evaluated given that submerged aquatic vegetation surveys were conducted in November 2005, rather than the appropriate season of June through September.

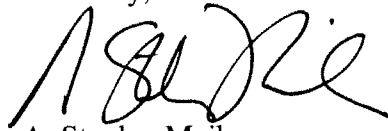
Mitigation

The projects that make use of previous development (e.g., 47 Canal Place, Lawrenz Eastern Marina) are noted for minimizing impacts to aquatic resources through redevelopment. Given that development of residential areas and marinas do not require siting in special aquatic sites (per 40 CFR Subpart E), none of these impacts are inherently water-dependent activities (40 CFR Part 230.10(a)). Efforts made to this point to avoid and minimize direct impacts are appreciated, with the original 2.15 acres of impact for 501 Point West (SAM-2006-949-MBM) having been reduced to 0.79 acres, and for Summerdance from 10.8 to 0.28 acres, and appropriate compensatory mitigation approaches in place. However, the 0.97 acres of impacts for Walker Creek have not been revised and the applicant has provided no alternatives analysis. Moreover, the proposal for Walker Creek does not include any compensatory mitigation, and is thus an incomplete application that should not be permitted.

Based on the above observations, EPA has determined that the project, as currently proposed, does not comply with the Guidelines. The project proposed for Oyster Bay (SAM-2006-310-MBM) is of particular concern given the issues described above. The Walker Creek proposal (SAM-2005-466-MBM) lacks an alternatives analysis or compensatory mitigation plan, and should be considered incomplete. EPA finds this project will have substantial and unacceptable adverse impacts on aquatic resources of national importance. Therefore, we recommend denial of the project, as currently proposed. This letter follows the field level procedures outlined in the August 1992 Memorandum of Agreement between the EPA and the Department of the Army, Part IV, paragraph 3(b) regarding Section 404(q) of the CWA.

Thank you for the opportunity to comment on this JPN. If you have any questions regarding these comments, please contact Rosemary Hall (Hall.Rosemary@epa.gov or 404-562-9846) or Jennifer Derby (Derby.Jennifer@epa.gov or 404-562-9401).

Sincerely,

A handwritten signature in black ink, appearing to read 'A. Stanley Meiburg'.

A. Stanley Meiburg
Acting Regional Administrator

cc: Alabama Department of Environmental Management - Scott Brown
US Fish & Wildlife Service - Patric Harper
Alabama Department of Conservation and Natural Resources – Matthew Marshall
NOAA National Marine Fisheries Service - Mark Thompson
US Environmental Protection Agency – Ntale Kajumba